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No. 99-

IN THE

Supreme Court of the United States

B.A.T INDUSTRIES p.l.c.,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,

Respondent.

(North Coast Trust Fund; Northern Calif. Plasterers Health & Welfare Trust Fund; Plastering Industry Welfare Trust Fund; Central Valley Painting & Decorating Health & Welfare Trust Fund; Northern California Tile Industry Health & Welfare Trust Fund; San Francisco Culinary, Bartenders and Service Employees Welfare Fund; Central Coast Trust Fund; Northern California Bakery Drivers Security Fund; Bay Area Delivery Drivers Security

(Continued on inside cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF SAN DIEGO,
STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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Fund; U.A. Local No. 393 Health and Welfare Trust Fund; Northern California General Teamsters Security Fund; Joint Benefit Trust; Northern California Pipe Trades Health and Welfare Trust; IBEW Local 595 Health and Welfare Trust Fund; Shop Ironworkers Local 790 Welfare Plan, *Real Parties in Interest*)

QUESTIONS PRESENTED FOR REVIEW

1. Whether service of process via international registered mail on a citizen of a country that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 20 U.S.T. 361 (1969), complies with the requirements of that international treaty, an issue upon which the Circuit Courts of Appeal are split.

2. Whether, as some lower courts have held, this Court's holding in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 334 (1925), remains good law such that a corporation's forum contacts are not attributable to its sole shareholder for purposes of jurisdictional analysis unless the relationship between the two is such that the conduct of the corporation would be attributable to its shareholder for all purposes, or whether, as other lower courts have held, *Cannon Mfg.* has been supplanted by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), such that it is not a violation of constitutional due process for a state to consider the contacts of a corporation in assessing whether its out-of-state shareholder has minimum contacts with the forum.

PARTIES TO THE PROCEEDING

The Petitioner is B.A.T Industries p.l.c.

The real parties in interest are plaintiffs North Coast Trust Fund; Northern California Plasterers Health & Welfare Trust Fund; Plastering Industry Welfare Trust Fund; Central Valley Painting & Decorating Health & Welfare Trust Fund; Northern California Tile Industry Health & Welfare Trust Fund; San Francisco Culinary, Bartenders and Service Employees Welfare Fund; Central Coast Trust Fund; Northern California Bakery Drivers Security Fund; Bay Area Delivery Drivers Security Fund; U.A. Local No. 393 Health and Welfare Trust Fund; Northern California General Teamsters Security Fund; Joint Benefit Trust; Northern California Pipe Trades Health & Welfare Trust; IBEW Local 595 Health & Welfare Trust Fund; and Shop Ironworkers Local 790 Welfare Plan; and defendants (other than Petitioner) Philip Morris, Inc.; R. J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp.; British American Tobacco Co. Ltd.; Lorillard Tobacco Co.; The American Tobacco Co., Inc.; Liggett Group, Inc.; U.S. Tobacco Co.; The Tobacco Institute; The Council for Tobacco Research U.S.A.; Smokeless Tobacco Council, Inc.; Chartered Distribution Services; Core-Mark International, Inc.; Grocery Specialty Company; Certified Grocers of California, Ltd.; Kennedy Wholesale, Inc.; Hill and Knowlton, Inc.; and DNA Plant Technology Corp.

STATEMENT PURSUANT TO RULE 29.6

Petitioner B.A.T Industries p.l.c. discloses that it is a wholly owned subsidiary of British America Tobacco (1998) Limited. British American Tobacco (1998) Limited is a wholly owned subsidiary of British American Tobacco p.l.c.

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B.A.T Industries p.l.c. ("B.A.T Industries") respectfully petitions for a writ of certiorari to review the judgment of the Superior Court for the County of San Diego (the "Superior Court").

OPINION BELOW

The opinion of the Superior Court (App. 1a - 6a), captioned a "Telephonic Ruling," is unpublished. The orders of the California Court of Appeal, Fourth Appellate District, Division One (App. 7a) and the California Supreme Court (App. 8a), each of which summarily denied review of the Superior Court's Telephonic Ruling, also are unpublished.

STATEMENT OF JURISDICTION

On or about March 1, 1999, the Superior Court entered its Telephonic Ruling (dated February 26, 1999) denying B.A.T Industries' Motion to Quash Service of Summons and to Dismiss the Complaints for Lack of Personal Jurisdiction and for Insufficient Service of Process. On June 22, 1999, the Fourth District Court of Appeal summarily denied B.A.T Industries' Petition for a Writ of Mandate. The California Supreme Court summarily denied B.A.T Industries' Petition for Review on September 15, 1999. As B.A.T Industries has availed itself of all appellate procedures available to it under California law, the Superior Court's Telephonic Ruling is final within the meaning of 28 U.S.C. § 1257. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides in full:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

> of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California long-arm statute, Cal. Civ. Proc. Code § 410.10, provides in full that "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1969) provides in full:

> Provided the State of destination does not object, the present Convention shall not interfere with —
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The complete text of the this Convention is set forth in the Appendix (App. 9a - 29a).

STATEMENT OF THE CASE

This petition for certiorari arises out of a coordinated proceeding involving numerous actions by private parties that seek to recover damages from manufacturers and sellers of tobacco products. Petitioner B.A.T Industries, however, is neither a manufacturer nor a seller of any product. It is an overseas holding company that has no presence of its own in the State of California. Nevertheless, the Superior Court for the

County of San Diego, Judge Ronald S. Prager presiding ("Superior Court") found B.A.T Industries subject to personal jurisdiction in California based upon the forum contacts of its indirectly held subsidiary, Brown & Williamson Tobacco Corporation ("Brown & Williamson"). Brown & Williamson is a defendant in these actions and has not contested jurisdiction.

The Superior Court also held that delivery of a summons and complaint upon B.A.T Industries at its sole office in London, England via international registered mail constituted sufficient service of process under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention], to which the United States and United Kingdom are signatories.

After the Superior Court in a "Telephonic Ruling" denied its Motion to Quash Service of Summons and to Dismiss the Complaints for Lack of Personal Jurisdiction and for Insufficient Service of Process (the "Motion to Quash") in 15 of the coordinated actions, B.A.T Industries filed a Petition for Writ of Mandate ("Writ Petition") seeking review of that denial by the California Courts of Appeal, Fourth Appellate District, Division One (the "Court of Appeal"). That court summarily denied B.A.T Industries' Writ Petition. B.A.T Industries then filed a Petition for Review seeking review by the Supreme Court of the State of California. However, on September 15, 1999, the California Supreme Court summarily denied B.A.T Industries' Petition for Review.

Under the law and procedure of the State of California, the Superior Court's Telephonic Ruling ("Order") then became final such that B.A.T Industries could neither challenge jurisdiction in the Superior Court at any other stage of the proceedings (such as on summary judgment or at trial), nor have the order reviewed by the California Courts of Appeal on an appeal from an adverse judgment. Thus, the trial court's holdings that service by mail comported with the requirements of the applicable international treaty, and that it may exercise personal jurisdiction

over B.A.T Industries consistently with constitutional due process, are final under 28 U.S.C. § 1257.

A. Service Of Process

Respondents purported to serve B.A.T Industries by sending the summonses and complaints directly to the company's London office via international registered mail. At no time was B.A.T Industries served with process either personally or by the Central Authority appointed by the United Kingdom under the Hague Service Convention.

B. B.A.T Industries' Lack Of California Contacts

B.A.T Industries is not an operating company. It does not manufacture or distribute any goods or products in California, or anywhere else, and has never done so. It does not advertise or market any goods or products in California, or anywhere else, and has never done so. It does not have any office, employee, representative, real or personal property, mailing address, bank account, telephone listing or place of business in California. It is neither registered to do business in California nor doing business in the State.

B.A.T Industries is an overseas holding company. Its business has been to administer its investments in hundreds of subsidiaries, which at times have included department stores, insurance companies, paper companies and tobacco companies. In so doing, B.A.T Industries has always granted its hundreds of subsidiaries broad autonomy. It has never exercised day-to-day control over their internal affairs. Nor has B.A.T Industries authorized any of its subsidiaries to act as its agent in California.

In short, B.A.T Industries lacks the minimum contacts necessary to subject it to jurisdiction in California consistent with constitutional due process and principles of fundamental fairness.

C. B.A.T Industries' Motion To Quash

In the opening and reply memoranda of law submitted in support of its Motion to Quash, B.A.T Industries challenged plaintiffs' method of service of process, contending that

"[s]ervice by international registered mail does not comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters." Respondents asserted that service of process via international registered mail complies with the requirements of the Hague Service Convention.

B.A.T Industries also disproved the complaints' jurisdictional allegations. The complaints alleged that B.A.T Industries sold cigarettes in California "through Brown & Williamson." B.A.T Industries' Motion to Quash was accompanied by the affidavit of Peter L. Clarke, Company Secretary of B.A.T Industries, which stated that "*No entity*, including *any subsidiary* of B.A.T Industries, *has ever held express or implied authority to act as B.A.T Industries' agent* to manufacture, market, package, sell, distribute or advertise tobacco products or any other goods or products anywhere in the United States, including California." (Emphasis added.) B.A.T Industries argued that because it does not exercise undue control over Brown & Williamson, and because Brown & Williamson is not B.A.T Industries' agent, the forum contacts of its subsidiary cannot be attributed to B.A.T Industries for purposes of determining whether the parent company is subject to personal jurisdiction in California. B.A.T Industries further argued that because B.A.T Industries had not "purposefully established minimum contacts" in California, and because the exercise of jurisdiction over it by the Superior Court would not comport with "traditional notions of fair play and substantial justice," due process required its Motion to Quash be granted.

B.A.T Industries urged the Court to follow the decisions of the two other courts (one federal, one state) that had ruled upon whether the company was subject to personal jurisdiction in California smoking and health litigation. Both of these courts had found that B.A.T Industries did not exert undue domination or control over Brown & Williamson, that there was no basis for piercing the corporate veil that separates the two entities and that Brown & Williamson was not B.A.T Industries' agent.

Both courts had held that B.A.T Industries was not subject to personal jurisdiction in the State.

In opposing B.A.T Industries' Motion to Quash, respondents did not attempt to pierce the corporate veil. They elected instead to rely principally upon an agency theory of jurisdiction. They argued that B.A.T Industries "used Brown & Williamson as its agent to sell tobacco in the United States, including California," and that B.A.T Industries — a holding company with no manufacturing operations — placed cigarettes into the stream of commerce "through Brown & Williamson." Respondents have taken the position in these coordinated cases that if jurisdiction may properly be exercised over a subsidiary corporation in a particular forum, then exercising jurisdiction over the parent is equally proper.

D. The Superior Court's Order

The Superior Court, acknowledging a "clear split of authority on both a state and federal level," and citing to cases on each side of the split, chose to follow *Shoei Kako Co. v. Superior Court*, 109 Cal. Rptr. 402 (Cal. Ct. App. 1973), rather than *Suzuki Motor Co., Ltd. v. Superior Court*, 249 Cal. Rptr. 376 (Cal. Ct. App. 1988), and thus held that service upon a foreign corporation via international registered mail was "effectual as not violative of the Hague Convention." App. 6a. Addressing B.A.T Industries' personal jurisdiction argument, the Superior Court noted that because California's long-arm statute was co-extensive with the reach of due process, it was only necessary to assess whether the exercise of jurisdiction over B.A.T Industries was constitutional. It then held that the forum contacts of U.S. cigarette manufacturer Brown & Williamson could be imputed to that company's overseas, indirect parent holding company, B.A.T Industries, and that the exercise of personal jurisdiction over B.A.T Industries would not "be violative of 'traditional notions of fair play and substantial justice.' " App. 3a. (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Burger King Corp. v. Rudzewicz*, 472 U.S. 462, 476-77 (1986)).

The Superior Court did *not* find that B.A.T Industries exercised such undue control over its U.S. subsidiary as to make the latter company its alter ego. The Superior Court held, however, that B.A.T Industries' issuance of generalized policies and guidelines to its subsidiaries was, without more, sufficient to support attribution of Brown & Williamson's forum contacts to its shareholder. The Superior Court considered B.A.T Industries' statements such as "sell more cigarettes" to be "indicative of moving defendant's use of Brown & Williamson as its instrumentality in this State for establishing market share [and] selling of tobacco products. . . ." App. 2a. The Superior Court failed to conduct the careful due process inquiry mandated by numerous decisions of this Court.

E. The Superior Court's Order Is Final Under 28 U.S.C. § 1257

B.A.T Industries sought review of the Superior Court's Order in the California Court of Appeal and then in the California Supreme Court, both of which summarily denied review of B.A.T Industries' Petitions.[1] Accordingly, B.A.T Industries has exhausted its state court appellate rights.

The courts of California, unlike federal courts and those of most states, always determine personal jurisdiction at the outset of an action on a final, as opposed to preliminary, basis — even where (as here) no evidentiary hearing has been held. Moreover, California does not grant a defendant an appeal as of right from the denial of a jurisdictional or service of process motion; it affords such a defendant only the right to seek discretionary, interlocutory review by way of a Petition for a Writ of Mandate. If a defendant does not secure review it must either answer the complaint or default in the action. *See* Weil & Brown, Civil Procedure Before Trial § 3:396 (1997). Answering the complaint

1. In each of these Petitions, B.A.T. Industries reiterated its arguments "that the exercise of jurisdiction over B.A.T. Industries would . . . be constitutionally impermissible," and that service by registered mail service "does not comply with the requirements of the Hague Convention."

constitutes a general appearance of submission to personal jurisdiction and forecloses any opportunity to challenge the trial court's finding at any later point in the proceedings before either the trial or the appellate courts. Cal. Civ. Proc. Code § 1014 (West 1998); *McCorkle v. City of Los Angeles*, 449 P.2d 453, 457 (Cal. 1969) (where petition for writ of mandate is denied, defending on merits waives defendant's jurisdictional challenge and is not a ground for a later appeal from the judgment); *Mansour v. Superior Court*, 46 Cal. Rptr. 2d 191, 194-95 (Cal. Ct. App. 1995). Thus, B.A.T Industries can preserve its jurisdictional defense only by suffering a default judgment. *McCorkle*, 449 P.2d at 458 (defendant may only "reserve his jurisdictional objection on appeal if, after the denial of his motion to quash, he makes no general appearance but suffers a default judgment"); Weil & Brown, *supra*, at § 3:396. The Superior Court's Order therefore is final under 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

B.A.T Industries respectfully submits that this Court should grant certiorari because the first question that this petition poses raises an issue on which the Circuit Courts of Appeal are split and presents the interpretation of an international treaty, while the second question raises both the continuing validity of this Court's precedent and the limits of constitutional due process.

I. Service Of Process Under The Hague Service Convention

The Superior Court upheld service of the summons and complaint upon B.A.T Industries by international registered mail, over B.A.T Industries' objections. Thus, this Petition presents an important question of law that this Court has not addressed and over which the Circuit Courts of Appeal are divided: Whether mere mailing constitutes proper service of process upon a foreign national under the Hague Service Convention.

The Hague Service Convention is a treaty among the United States and several other countries, including the United Kingdom, that addresses service of various types of papers in civil litigation among citizens of more than one signatory state. Its purpose is to provide parties with a clear set of procedural rules. *See* Hague Service Convention, Preamble; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988); *Shoei Kako Co. v. Superior Court*, 109 Cal. Rptr. 402, 411 (Cal. Ct. App. 1973). That purpose is undermined, however, by the conflict among the Courts of Appeal that leaves trial courts and litigants without clear authority as to whether service of *process* on a foreign defendant via registered mail satisfies the requirements of the Hague Service Convention. This uncertainty affects American plaintiffs who are unsure of their obligations regarding service, foreign defendants who are equally unsure as to whether a court in the United States will consider service to have been effected and whether they must therefore appear, and the United States which is a party to the international agreement being interpreted.

B.A.T Industries respectfully submits that this open question is of sufficient importance to be answered by this Court.

A. The Relevant Provision of the Hague Service Convention

The United States and the United Kingdom are both signatories to the Hague Service Convention. Its purpose is to establish an "appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time. . . ." Hague Service Convention, Preamble. "By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Schlunk*, 486 U.S. at 699.[2]

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2. As the Superior Court found, the Hague Service Convention is applicable in this case. *See* App. 4a.

The United States Circuit Courts of Appeal are divided as to whether the Hague Service Convention provision for mailing documents, Article 10(a), applies to service of process, or whether service of process instead must be accomplished pursuant to provisions of the treaty that are specific thereto, for example Article 10(b). The provision of the Hague Service Convention at issue is Article 10, which provides:

> Provided the State of destination does not object, the present Convention shall not interfere with —
>
> (a) the freedom to *send judicial documents*, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin *to effect service of judicial documents* directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding *to effect service of judicial documents* directly through the judicial officers, officials or other competent persons of the State of destination.

(Emphasis added.) Thus, the central inquiry for this Court is whether "send" as used in Section 10(a) of the Hague Service Convention has a meaning equivalent to that of "serve" or "service."

Two distinct lines of federal authority have developed on this point. Most courts to consider the question, including the Court of Appeals for the Eighth Circuit, have held that the word "send" in Article 10(a) does *not* mean service of process. "Subscribers to this interpretation maintain that Article 10(a) merely provides a method for sending subsequent documents after service of process has been obtained by means of the central authority." *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989). A minority of courts, including the Court of Appeals for the Second Circuit, has ruled that Article 10(a) permits service of process upon the defendant by mail, thus

relieving the plaintiff of his burden of using the proper authorities appointed under the Convention for effecting service. *See, e.g., Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986).

B. The *Bankston* Line of Cases: "Send" Does Not Mean "Serve"

The Court of Appeals for the Eighth Circuit held in *Bankston*, 889 F.2d at 174, that "send" does not mean "serve" in the context of Article 10(a), and that Article 10(a) only permits parties to send documents by registered mail in an action *after* service of process has been effected in accordance with one of the sections of the Hague Service Convention that explicitly addresses "service of process," such as Articles 10(b) or (c) (service by "judicial officers") or Article 5 (service by a "central authority").

Many other courts have agreed with this analysis. *See, e.g., Knapp v. Yamaha Motor Corp., U.S.A.*, 60 F. Supp. 2d 566, 573 (S.D.W. Va. 1999); *Friedman v. Israel Labour Party*, No. Civ. A 96-CV-4702, 1997 WL 379181, at *3 (E.D. Pa. Jul. 2, 1997); *Golub v. Isuzu Motors*, 924 F. Supp. 324, 327-28 (D. Mass. 1996); *Brand v. Mazda Motor of America, Inc.*, 920 F. Supp. 1169, 1172 (D. Kan. 1996); *Moreland v. Tohnichi Mfg. Co.*, No. 95 C 4047, 1995 WL 616667, at * 2 (N.D. Ill. Oct. 19, 1995); *Fitzgibbon v. Sanyo Sec. America, Inc.*, No. 92 Civ. 2818, 1994 WL 281928, at *10 (S.D.N.Y. Jun. 22, 1994); *Gonnuscio v. Seabrand Shipping Ltd.*, 908 F. Supp. 823, 825 (D. Or. 1995); *Pennebaker v. Kawasaki Motors Corp. U.S.A.*, 155 F.R.D. 153, 157 (S.D. Miss. 1994); *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1082 (E.D. Pa. 1992); *Wilson v. Honda Motor Co.*, 776 F. Supp. 339, 341-42 (E.D. Tenn. 1991); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985); *Honda Motor Co. v. Superior Court*, 12 Cal. Rptr. 2d 861, 862-63 (Cal. Ct. App. 1992).

Bankston and the cases to follow it rely upon this Court's admonition that where drafters "include[ ] particular language in one section of a statute but omit[ ] it in another section of the

same Act, it is generally presumed that [they] act[ ] intentionally and purposely in the disparate inclusion or exclusion." *Bankston*, 889 F.2d at 174 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The drafters used the words "serve" and "service" thirteen times to refer to service of process, and in no other section of the treaty did the drafters use the word "send" to mean "service." "The word 'service' is specifically used in other sections of the Convention, including subsections (b) and (c) of Article 10. If the drafters of the Convention had meant for subparagraph (a) to provide an additional manner of service of judicial documents, they would have used the word 'service.' " *Bankston*, 889 F.2d at 173-74. As discussed *infra*, *Ackermann* and its progeny simply chalk up this inconsistency in an international treaty to "careless drafting." 788 F.2d at 839.

In *Suzuki Motor Co. v. Superior Court*, 249 Cal. Rptr. 376 (Cal. Ct. App. 1988), the court adopted a similar approach, also noting that the common definition of "send" does not encompass service of process.

> [T]he Convention persistently refers to "service" as opposed to "send," e.g., "forward documents, for the purpose of service" (art. 9); "transmission of judicial documents for service" (art. 14); and "transmitted abroad for the purpose of service" (arts. 15 and 16), in contrast to "the freedom to send judicial documents, by postal channels, directly to persons abroad, . . ." (art. 10, subd. (a)). It is a well-recognized canon of statutory interpretation that words in a statute or similar enactment are to be given their common and ordinary meaning, . . . and that every word and phrase used is presumed to have a meaning and to perform a useful function. To interpret the phrase "to send" as used in Article 10, subdivision (a) of the Convention to mean "to serve" would fly in the face of both these rules; the common and ordinary meaning of "to send" is "to cause to be conveyed by an intermediary to a

> destination" or "to dispatch, as by mail and telegraph" . . . not "to serve," and the fact the Convention's drafters used both the phrase "to send" and the phrase "service of process" indicates they intended each phrase to have a different meaning and function.

249 Cal. Rptr. at 379 (citations omitted).[3]

Other courts, relying on this Court's precedent, have noted that plain language interpretation is particularly important in the construction of treaties.

> [W]here a legislative body uses terms that have acquired meaning under either equity or common

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3. The Superior Court stated that *Suzuki* and some of the other cases to follow *Bankston* were distinguishable on the basis that they involved defendants located in Japan, where service of process by mail is not permitted internally. App. 5a-6a. However, those courts' reasoning rests upon their view that the word "send" in Article 10(a) does *not* mean service of process. The reasoning of *Bankston* and its adherents rejects the notion that Article 10(a) allows for service of process by registered mail in *any* signatory state. *See Bankston*, 889 F.2d at 173-74; *Suzuki*, 249 Cal. Rptr. at 381. *See also Mateo v. M/S Kiso*, 805 F. Supp. 792, 797 (N.D. Cal. 1992) ("[T]he language used in Article 10 indicates that Article 10(a) was not intended to permit service. Article 10(a) uses the word 'send' while Articles 10(b)-(c) use the words 'effect service of process.' As the language used in international treaties is usually chosen with great care, the Court strictly construes Article 10(a) only to allow the sending of legal documents other than summons."). Because it rests upon the language of the treaty and not on the conventions of a particular signatory State, this approach is as applicable to United Kingdom defendants as it is to Japanese defendants. Indeed, it has been applied in cases involving residents of the United Kingdom as well as other signatory countries beside Japan. *See, e.g., Postal v. Princess Cruises, Inc.*, 163 F.R.D. 497, 499-500 (N.D. Tex. 1995) (service by registered mail on United Kingdom defendant did not comply with Hague Service Convention); *Arco Elecs. Control Ltd. v. Core Int'l*, 794 F. Supp. 1144, 1146 (S.D. Fla. 1992) (Israel); *Hantover, Inc. v. Omet, S.N.C. of Volentieri & C.*, 688 F. Supp. 1377, 1385 (W.D. Mo. 1988) (Italy).

> law, a court must infer, unless the statute otherwise dictates, that the legislative body means to incorporate the established meaning of those terms. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). These principles of statutory construction apply with equal or even greater force when courts are called upon to interpret a treaty. When interpreting treaties, courts must be especially careful to follow the language and not to alter or insert any clauses. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 133-35 (1989). To conclude here that the word "send" in Article 10(a) includes "service" would be inconsistent with the plain meaning of the language.

Golub, 924 F. Supp. at 327.

Thus, the *Bankston* line of cases relies on well-established principles of statutory interpretation to determine that "send" does not mean "serve" in a treaty that repeatedly refers to "service" when discussing service of process, and thus that service of process may not be accomplished by mail upon a citizen of a Hague Service Convention signatory.

C. The *Ackermann* Line of Cases: "Send" Means "Serve"

In *Ackermann v. Levine*, the Court of Appeals for the Second Circuit reasoned that because the purpose of the Hague Service Convention is to facilitate service, the reference to " 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service." 788 F.2d 830, 839 (2d Cir. 1989) (quoting *Shoei Kako Co. v. Superior Court*, 109 Cal. Rptr. 402, 411-12 (Cal. Ct. App. 1973). The court concluded that the use of the word " 'send' rather than the otherwise consistently used 'service' must be attributed to careless drafting." *Id.* (quotation marks and citation omitted). *See also Eli Lilly and Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 471-72 (D.N.J. 1998) (adopting Second Circuit's view and relying on 1 B. Ristau, International Judicial Assistance

(Civil and Commercial) §§ 4-10, 132, §§ 4-28, 165-67 (1984)). This approach has been followed by a number of federal district courts and state courts. *See, e.g., Trump Taj Mahal Assocs. v. Hotel Servs., Inc.*, 183 F.R.D. 173, 179 (D.N.J. 1998); *Ortega Dominguez v. Pyrgia Shipping Corp.*, No. Civ. A. 98-529, 1998 WL 204798, at *2 (E.D. La. Apr. 24, 1998); *Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997); *EOI Corp. v. Medical Mktg. Ltd.* 172 F.R.D. 133, 140-41 (D.N.J. 1997); *Lestrade v. United States*, 945 F. Supp. 1557, 1559 (S.D. Fla. 1996); *R. Griggs Group Ltd. v. Filanto SpA*, 920 F. Supp. 1100, 1107 (D. Nev. 1996); *Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 480 (D.P.R. 1992); *Patty v. Toyota Motor Corp.*, 777 F. Supp. 956, 959 (N.D. Ga. 1991); *Melia v. Les Grands Chais de France*, 135 F.R.D. 28, 36 (D.R.I. 1991); *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364, 1372 (M.D. Ala. 1989); *Shoei Kako*, 109 Cal. Rptr. at 411-12.

In summary, the *Ackermann* line of cases interprets Article 10(a) of the Hague Service Convention as providing for service of process via international registered mail. The *Bankston* line of cases is in direct conflict; these authorities interpret the same provision as only permitting the sending of documents by registered mail after service has been effected by one of the methods expressly permitted in other provisions of the Convention. This conflict of authority is an important question of international civil procedure that is squarely raised in this case. Petitioner respectfully requests that the Court grant review in order to resolve this conflict.

II. The Continuing Vitality of the Cannon Doctrine

In *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), this Court held that a parent corporation may not be subjected to personal jurisdiction in a particular forum on the basis that it owns a subsidiary doing business there. That holding has for decades provided guidance to parent corporations and shareholders, allowing them to order their affairs in a manner consistent with *Cannon* and the basic corporate principles of

limited liability for the owners of incorporated entities, and to be assured that they would not be subject to suit wherever the entities in which they held stock did business. By establishing this precedent, the Court furthered the due process tenet that parties should be able to determine whether the actions they are contemplating will bring them within the reach of any given forum. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring) (individuals and corporations are constitutionally entitled to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign").

The Court's precedent and the guidance it had provided, however, have been eroded over recent years as certain lower courts have either explicitly stated that *Cannon* is no longer good law, or implicitly departed from *Cannon* by attributing subsidiary forum contacts to parent companies for jurisdictional purposes when the parent corporation has at all times acted consistent with its role (and obligations) as a holding company with public shareholders of its own. Thus, the Superior Court denied B.A.T Industries' Motion to Quash in the view that due process allows a court to impute a subsidiary's forum contacts to its parent holding company if the holding company exercises *ordinary, general* executive oversight and therefore is not a totally passive investor — even if the holding company does not exercise undue control over the subsidiary's operations.

Petitioner respectfully suggests that this Court should grant certiorari in order to resolve the confusion prevailing in the lower courts as to whether *Cannon* is still good law, or whether it was supplanted by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), such that a subsidiary's forum contacts may be considered in an analysis of its parent company's jurisdictional contacts, even where the corporate form has been observed and the parent would not be liable for the subsidiary's actions. As noted by one of the courts to subscribe to the minority view that *Cannon* is no longer good law, "[t]he Supreme Court has not commented directly on the relevance of *Cannon* to the present due process analysis of personal jurisdiction."

In re Telectronics Pacing Sys., Inc., 953 F. Supp. 909, 917 (S.D. Ohio 1997).

A. *Cannon* Prevents A State From Exercising Personal Jurisdiction Over A Nonresident Parent Company On The Basis Of Its Subsidiary's Contacts Where Parent And Subsidiary Have Observed The Corporate Form

In *Cannon*, the plaintiff, Cannon Manufacturing Co. ("Cannon"), sued Cudahy Packing Co. ("Cudahy Co."), a Maine corporation, in North Carolina for breach of contract. 267 U.S. at 333. Cannon attempted to serve Cudahy Co. with process by serving the summons and complaint on the defendant's wholly owned subsidiary, the Cudahy Packing Company of Alabama ("Cudahy Alabama") at the latter's office in North Carolina. Cudahy Co. moved to set aside service and dismiss the action on grounds of lack of jurisdiction, arguing that it was not doing business within North Carolina. Cannon opposed the motion, arguing that parent and subsidiary should be regarded as a single entity for purposes of determining authority to accept process and amenability to jurisdiction.

The question presented to this Court was "whether, at the time of the service of process, [Cudahy Co.] was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there." *Id.* at 334. This Court found that the decision to establish a subsidiary is a legitimate one that should be respected by the courts, and held that corporate separation and limited liability principles are as meaningful in the jurisdictional context as in the liability context.

In so holding, this Court observed that Cudahy Co. was far more than a totally passive investor in Cudahy Alabama. *Id.* at 335. Nonetheless, it determined that the corporate separation between Cudahy Co. and Cudahy Alabama was "in all respects observed": parent and subsidiary dealt with each other in the manner of two "wholly independent corporations. . . . The corporate separation, though perhaps merely formal, was real. It was not pure fiction." *Id.* at 335,

337. Accordingly, this Court concluded that Cudahy Co. was not present, and therefore not subject to jurisdiction, in North Carolina. *Id.* at 338.

The *Cannon* decision has been interpreted by the lower federal and state courts as standing for a simple proposition — unless a parent corporation abuses the corporate form such that there is no "real" separation between it and its subsidiary, the subsidiary's forum contacts should not be attributed to its parent company for jurisdictional purposes. *See, e.g., Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 675-76 (D.C. Cir. 1996); *Mylan Lab., Inc. v. Akzo N.V.*, 2 F.3d 56, 61 (4th Cir. 1993); *United Elec., Radio and Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992); *Wesleyan Pension Fund, Inc. v. First Albany Corp.*, 964 F. Supp. 1255, 1261-62 (S.D. Ind. 1997); *Jemez Agency, Inc. v. Cigna Corp.*, 866 F. Supp. 1340, 1343 (D.N.M. 1994). Many of these lower courts that have followed the *Cannon* doctrine have done so on constitutional grounds. *See, e.g., Donatelli v. National Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *Wesleyan Pension Fund*, 964 F. Supp. at 1261-62; *Jemez Agency*, 866 F. Supp. at 1347-48.[4]

B. The Lower Courts Are Split As To Whether *Cannon* Is Still Good Law

The majority rule, which has been adopted by the United States Courts of Appeal for the Fifth, First and District of Columbia Circuits, is that *Cannon* is still viable, and therefore apply corporate law principles in the jurisdictional context. However, a minority of courts and commentators, including the United States Court of Appeals for the Sixth Circuit, have taken the position that *Cannon* was superseded by this Court's holding

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4. While the *Cannon* opinion itself states that "[n]o question of the constitutional powers of the state, or of the federal government, is directly presented," 267 U.S. at 336, as noted in the text, subsequent courts have held that the doctrine — developed by later decisions of this Court — has attained a constitutional dimension that is separate from the holdings of *International Shoe* and its progeny.

in *International Shoe*, such that a subsidiary's forum contacts may be considered in determining whether a parent company has minimum contacts with the forum.

In *International Shoe*, this Court abandoned the requirement that a non-resident defendant be "present" in the forum in order for personal jurisdiction properly to be exercised. It held instead that a defendant may be sued in any forum in which it is not physically present at the time of service if it has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citation omitted). A minority view, which is held by the Sixth Circuit (among other courts), reasons that because *Cannon*, like *Pennoyer v. Neff*, 95 U.S. 714 (1877), was focused on whether the parent corporation is "present" in the forum state, *Cannon* was implicitly overruled when this Court abandoned *Pennoyer*'s presence requirement.[5]

1. *The Majority Rule: Cannon And Its Progeny Mandate The Application Of Corporate Law Principles In The Jurisdictional Context*

The majority rule is that *Cannon* still stands for the general proposition that a court may not attribute a subsidiary's contacts to its parent in a jurisdictional analysis *unless* the plaintiff has made a showing that the companies failed to observe corporate formalities or engaged in some abuse of the corporate form:

> In exceptional cases, . . . a court may properly invoke jurisdiction over a parent corporation predicated upon the acts of its subsidiaries in one of two situations. First, if the parent's control of the

5. *See* Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1, 5 (1986) [hereinafter Brilmayer] (noting that "since *International Shoe Co. v. Washington*, 'presence' has no longer been an important test for amenability to suit. If *Cannon* is an artifact of the 'presence' test, it possibly has been superseded," but concluding that *Cannon* remains good law).

> subsidiary goes beyond that normally exercised by a majority shareholder, and is so complete as to render the subsidiary an instrumentality of the parent, the Court may deem the subsidiary the mere alter ego of the parent, and accordingly, may pierce the corporate veil. Alternatively, if the subsidiary does an act at the direction of the parent, or in the course of the parent's business, the Court may characterize the subsidiary as an agent of the parent and thereby hold the parent answerable as a principal.

Jemez Agency, 866 F. Supp. at 1343 (citations and quotation marks omitted). *See also, e.g.*, *Dickson Marine*, 179 F.3d at 338; *El-Fadl*, 75 F.3d at 676; *I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983). These exceptions are consistent with *Cannon*'s general holding, because in either case the corporations have failed to observe the corporate form and the parent has purposefully availed itself of the forum by unduly controlling the activities undertaken by its subsidiary there. *See, e.g.*, *Donatelli*, 893 F.2d at 465 (in determining its "constitutional power to assert personal jurisdiction over the parent based on the subsidiary's activities," a court will apply "a presumption of corporate separateness that may be overcome by clear evidence" that the parent company has exercised undue control over the subsidiary) (citations, quotation marks and brackets omitted); *Dickson Marine*, 179 F.3d at 338 (same).

The question of attribution was addressed by this Court in *Rush v. Savchuk*, 444 U.S. 320 (1980). There, the defendant in an automobile accident case had no contacts with Minnesota, the forum state. The defendant's insurer, however, did conduct business in Minnesota, and the plaintiff attempted to obtain quasi in rem jurisdiction by garnishing the defendant's rights under his insurance policy issued by State Farm Mutual Automobile Insurance Company ("State Farm"). The Minnesota court "attempted to attribute State Farm's contacts to Rush by

considering the 'defending parties' together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the assertion of jurisdiction over Rush based solely on the activities of State Farm." *Id.* at 331-32 (footnote omitted). The Court rejected this attempt. "The requirements of *International Shoe*. . . must be met as to *each defendant* over whom a state court exercises jurisdiction." *Id.* at 332 (emphasis added).

Subsequently, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), a New York resident sued a magazine publishing company, its holding company, and the publisher/editor/owner of the published magazine. The Court found that the plaintiff had established that the magazine company had minimum contacts with the forum state because it sold numerous magazines there out of which the libel claim arose. The plaintiff had not, however, even attempted to address the other two defendants' forum contacts. Accordingly, this Court remanded on the question of whether jurisdiction could be exercised over the holding company and the individual. Citing to earlier cases that had relied on *Cannon*, as well as to *Rush*, the Court held that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually." *Id.* at 781 n.13 (citations omitted). *See also Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (same).

These cases demonstrate that *Cannon* retains a constitutional aspect. Its fundamental holding, that a subsidiary's contacts are irrelevant to the question of whether jurisdiction

may be exercised over its parent unless the relationship between parent and subsidiary departs from the usual rules of corporate behavior, is in line with the principles articulated by this Court in *Rush*, *Keeton* and *Hanson*. And it is consistent with the "principle of limited liability [which] is a pillar of corporate law." *United Elec., Radio and Mach. Workers*, 960 F.2d at 1091 (citations omitted).

This Court recently affirmed this line of reasoning in the liability context. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Court held that a parent corporation may not be held liable under the federal environmental laws on the basis of its subsidiary's acts merely because the parent exercises an ordinary level of control, stating that

> [I]t is hornbook law that the exercise of the "control" which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary. That "control" includes the election of directors, the making of by-laws and the doing of all other acts incident to the legal status of stockholders. . . . Control through the ownership of shares does not fuse the corporations. . . .

Id. at 61-62, 69 (citations and quotation marks omitted). Indeed, a parent corporation has an affirmative duty to exercise general oversight of its subsidiaries. *See, e.g., Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1486 (C.D. Ill. 1996) ("The Court has no problem with [the parent's] implementation of [general policies and budgeting processes] throughout its subsidiaries. Indeed, such policies demonstrate sound business judgment by a parent corporation.").

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), this Court held that "[t]he Due Process Clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (Citation and quotation marks

omitted). Similarly, a defendant cannot be subjected to jurisdiction in a particular forum unless it has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," *Hanson*, 357 U.S. at 253, such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

These baseline principles of predictability and foreseeability are, as some courts have found, violated when a shareholder or parent corporation has adhered to all of the rules regarding corporate separateness and nonetheless is held subject to jurisdiction on the basis of its ownership of shares in another entity.

> [A]ny suggestion that courts should not apply alter ego or agency principles as a component of due process analysis is contrary to . . . Supreme Court precedent. . . . [A] bedrock principle of corporate law is that shareholders are not held personally responsible for the acts of a corporation. . . . Individuals who adopt the corporate form of business, and carefully maintain corporate separateness in accordance with alter ego principles, are entitled to and expect to have the corporation treated as a separate entity. This reasonable expectation, expressly induced by law, should not be compromised by compelling shareholders otherwise shielded from personal liability to defend suits filed against the corporation in distant forums. . . . If a shareholder does everything it can to "structure its primary conduct," [*World-Wide Volkswagen*, 444 U.S. at 297], in such a way as to ensure corporate separation under state law — that is, the parent does not interfere in the internal management of the subsidiary corporation, observes corporate formalities, and does not use the corporation as a mere instrumentality or for fraudulent reasons — the corporation should be

> deemed a separate entity for all purposes. After making such efforts, that shareholder would not "reasonably anticipate being haled into court," [*id.*], in all states in which the corporation transacts business. *Any rule that would, in essence, permit corporations to be treated as separate entities for some purposes, but not for others, would frustrate the goals of the due process clause of "ensuring the orderly administration of the laws" and lending a "degree of predictability to the legal system."* *Id.*

Jemez Agency, 866 F. Supp. at 1346-47 (emphasis added).[6]

Forcing a holding company or shareholder to submit to personal jurisdiction in a particular forum with which it lacks direct contacts, on the basis of subsidiary presence there, can be extremely burdensome. *See, e.g.*, *Jemez Agency*, 866 F. Supp. at 1347; Voxman, 141 U. Pa. L. Rev. at 344; *cf. Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985). This is especially true where, as here, the nonresident defendant is a citizen of another country. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself

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6. *See also* William A. Voxman, Comment, Jurisdiction Over A Parent Corporation In Its Subsidiary's State of Incorporation, 141 U. Pa. L. Rev. 327, 344 (1992) ("The imposition of such burdens on the parent corporation runs counter to the very purpose of limiting the liability of the parent corporation in the first place and therefore arguably offends traditional notions of fair play and substantial justice. . . . [T]he integration of . . . the general principles of limited corporate liability into the *International Shoe* test is both legally and economically justifiable."); Brilmayer, 74 Cal. L. Rev. at 26 (suggesting that due process requirements prevent state from employing one set of rules for liability and another more lenient set of standards for jurisdiction; under such a theory, "[i]f the state attempted to depart from the ordinary substantive-law standard, federal limitations would be violated. This is a common pattern in situations where the federal Constitution protects rights originally defined by state law. . . . [S]tates may not alter their procedural rules when federal rights are at stake.").

in a foreign legal system should have *significant weight* in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.") (emphasis added).

Thus, it is a violation of the due process principles of reasonableness and foreseeability to subject a holding company to jurisdiction on the basis of a subsidiary's activities in the forum state when the entities adhered to corporate law principles in their relation to one another.

2. *The Minority Rule: International Shoe Displaced Cannon, And Corporate Law Principles Are Irrelevant To A Jurisdictional Inquiry*

A minority of courts has held that by abandoning *Pennoyer*'s presence requirement in *International Shoe*, this Court also overruled *sub silentio Cannon*'s focus on whether the parent corporation is "present" in the forum state. *See, e.g., Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1084 n.9 (E.D. Pa. 1992) (observing that cases rejecting *Cannon* "assume that when the Supreme Court abandoned the 'presence' requirement . . . and adopted the 'minimum contacts' test for jurisdiction . . . the Supreme Court also abandoned the strict 'presence' requirement of *Cannon*"); *Finance Co. of America v. Bankamerica Corp.*, 493 F. Supp. 895, 905 (D. Md. 1980) (observing that "the Fourth Circuit has abandoned, sub silentio, the formalistic inquiry required by *Cannon* in favor of a minimum contacts analysis"); *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 502 (D. Kan. 1978) ("The constitutional due process constraint of 'presence' that *Cannon* reflected was disapproved in *International Shoe*.").[7]

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7. *See also* Voxman, 141 U. Pa. L. Rev. at 331-32 (observing that "[m]any commentators also argue that *Cannon* has been superseded by the Supreme Court's so-called 'minimum contacts' analysis first set forth in *International Shoe Co. v. Washington*"); Philip I. Blumberg, The Law of Corporate Groups § 3.03 (1983) (arguing that the *Cannon* doctrine was displaced by *International Shoe*).

These courts have taken the position that corporate law principles have no place in the personal jurisdiction inquiry. Instead, in their view, the relationship between parent and subsidiary constitutes one contact of the parent with the forum state and the significance of that contact depends upon the "nature of the relationship [and] the degree of control or identity." *Energy Reserves Group*, 460 F. Supp. at 507. *See also, e.g., In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. at 915; *Meredith v. Health Care Prods., Inc.*, 777 F. Supp. 923, 926 (D. Wyo. 1991). Indeed, in *Meredith*, the individual shareholder defendants' only contact with the forum state was their interest in the corporation doing business there; the court nonetheless found that relationship sufficient. *Id.* at 924-26. To these courts, then, jurisdiction and liability are wholly separate inquiries: the subsidiary's activities within the forum are relevant to the question of jurisdiction over the parent even where the plaintiff has not made any showing that would be sufficient to hold the parent liable for the subsidiary's activities.

In *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292 (6th Cir. 1964), the Court of Appeals for the Sixth Circuit held that the "formalistic" approach of *Cannon* and the corresponding application of corporate law principles is no longer good law.

> [T]he law relating to the fictions of agency and of separate corporate entity was developed for purposes other than determining amenability to personal jurisdiction, and the law of such amenability is merely confused by reference to these inapposite matters. . . . Following [*International Shoe*] it would seem appropriate, for the purpose of determining the amenability to jurisdiction of a foreign corporation which happens to own a subsidiary corporation carrying on local activities, to inquire whether the parent has the requisite minimum contacts with the State of the forum. Thus *the ownership of the subsidiary carrying on local*

> *activities in Michigan represents merely one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts* with the State of Michigan. . . .

336 F.2d at 297 (emphasis added).

That Court of Appeals again applied this analysis (this time without mentioning *Cannon*), in *Third Nat'l Bank in Nashville v. WEDGE Group Inc.*, 882 F.2d 1087 (6th Cir. 1989). There, it held a parent corporation subject to personal jurisdiction in part because its wholly owned subsidiary conducted business in Tennessee. The court conducted no alter ego or agency analysis; it merely noted that the parent "was not a mere passive owner of [the subsidiary]; from 1982 to 1986 [parent] officers served as [subsidiary] directors and met regularly — as often as monthly — in Tennessee to review and direct [the subsidiary's] operations." *Id.* at 1090.

The *Velandra* analysis has been followed by a number of other lower courts, both within and without the Sixth Circuit. In *Energy Reserves Group, Inc. v. Superior Oil Co.*, the court held:

> [A]lter ego principles no longer play any proper role in the analysis of the constitutional propriety of the exercise of jurisdiction properly invoked by service authorized by statute . . . . [T]ransformation of alter ego principles into a restriction on the breadth of constitutional due process raises inherent inconsistencies in the fundamental fairness or minimum contacts analysis of the Fourteenth Amendment as defined by *International Shoe*. . . . For jurisdictional purposes, the fact of the existence of the relationship however substantial or attenuated the relationship may be is a minimum "contact, tie or relation" with the forum that may render possible the constitutional exercise of jurisdiction.

460 F. Supp. at 490, 505, 507. *See also In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. at 915, 918 ("The formalistic approach of the alter ego doctrine . . . is irrelevant to the question whether the exercise of jurisdiction over an absent parent corporation would violate the Due Process Clause. . . . We find persuasive the view that *International Shoe* has supplanted *Cannon* in the context of personal jurisdiction."); *Meredith*, 777 F. Supp. at 926 (following *Energy Reserves*); *Warren v. Honda Motor Co.*, 669 F. Supp. 365, 369 (D. Utah 1987) ("[T]he mere existence of the relationship between a parent and a subsidiary is a relevant factor, a minimum contact, which may make jurisdiction proper if the other relevant factors balance in that direction."); *Hoffman v. United Telecomm., Inc.*, 575 F. Supp. 1463, 1470-71 (D. Kan. 1983) ("the alter ego and minimum contacts tests bear little relation to each other. . . . [T]he factors which indicate those circumstances under which a subsidiary corporation and its parent or owner may be treated as one for purposes of liability . . . have little relation to those which bear upon the due process fairness question of requiring a defendant to answer in the forum."). *Cf. Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1327 (E.D.N.Y. 1981) (analyzing fiduciary shield doctrine in jurisdictional analysis and holding that courts must make "a common sense appraisal of economic relationships . . . [and] examine a business relationship from the practical viewpoint of businessmen rather than through the distorting lens of a legal conceptual framework established in an earlier era") (relied upon in *In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. at 919).

This was the approach taken by the Superior Court in finding B.A.T Industries subject to jurisdiction in California. The Superior Court found that Brown & Williamson's forum contacts could be attributed to its indirect parent holding company, B.A.T Industries, without a showing that B.A.T Industries exercised undue control, *i.e.*, control greater than that normally and appropriately exercised by a parent over its subsidiary. This finding was in direct conflict with the cases

that have upheld the continuing vitality of *Cannon*. *See Donatelli*, 893 F.2d at 466 ("[J]urisdiction has been premised on a finding of control — *not merely the degree of control innately inherent in the family relationship*, but the exercise of control by the parent 'greater than that normally associated with common ownership and directorship.' ") (quoting *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (emphasis added)). Despite the Superior Court's conclusory statement that jurisdiction rested on an agency theory, what that court actually *did* was attribute the subsidiary's contacts to the parent without any finding either of an express agency agreement or that the parent had exercised undue control. In the Superior Court's view, "B.A.T [Industries] says to Brown & Williamson, maximize your sales, sell more cigarettes . . . that's enough for an agency." Such a generalized directive that any parent company would be expected to give its operating subsidiary, the Superior Court found, was justification for attributing to B.A.T Industries every action that its subsidiary Brown & Williamson undertook in California to maximize sales. In the Superior Court's view, unless a sole shareholder is merely a passive investor, the forum contacts of the entity in which it owns shares are treated as the shareholder's own contacts for jurisdictional purposes.

While this analysis echoes the statements of those courts that have rejected *Cannon*, it would not be accepted by the many courts that hold due process requires the application of corporate liability principles in the jurisdictional context. Nor is the Superior Court's analysis consistent with the notion that due process requires that parties be able to order their affairs with assurance as to the consequences that may flow therefrom. Petitioner respectfully requests that this Court grant review in order to resolve the question of whether a court may, consistent with due process, hold a parent corporation subject to jurisdiction on the basis of its subsidiary's forum activities on a lesser showing than would be required to find the parent company liability for those subsidiary activities.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition for a writ of certiorari in order to resolve these two conflicts among the lower courts.

Respectfully submitted,

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APPENDIX

APPENDIX A — TELEPHONIC RULING OF THE SUPERIOR COURT, SAN DIEGO COUNTY, STATE OF CALIFORNIA DATED FEBRUARY 26, 1999

SUPERIOR COURT SAN DIEGO COUNTY
STATE OF CALIFORNIA
JUDICIAL COUNCIL COORDINATED PROCEEDING
TOBACCO CASE # JCCP-4042

TELEPHONIC RULING

FEBRUARY 26, 1999
TELEPHONIC RULINGS OF THE COURT
IN JCCP 4042
COORDINATED TOBACCO LITIGATION

SAN DIEGO SUPERIOR COURT
DEPARTMENT 69
HON. RONALD S. PRAGER

(3) The Court rules on the motion of defendant BAT Industries p.l.c. to quash service of summons and operative complaint served on it in San Francisco Superior Court Case Numbers 994575, 995226, 996189, 996262, 996822, 996855 and 998208; and Alameda Superior Court Case Numbers 798474-3, 797589-9, 801292-0, 799495-5, 797362-6, 798492-9, 799692-4 and 801309-3 as follows.

Motion to quash on the ground of lack of personal jurisdiction is denied as plaintiffs have met their burden of demonstrating by a preponderance of the evidence that moving defendant has or has had sufficient minimum contacts with this state justifying the exercise of personal jurisdiction over it. See *Floveyor International, Ltd. v. Superior Court* (1997)

59 Cal.App.4th 789, 793; *Ziller Electronic Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232; and *Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710. Specifically, the evidence proffered by plaintiffs inclusive of a memorandum drafted by moving defendant setting forth guidelines for the operation of its subsidiary Brown & Williamson and a "Statement of Business Conduct" issued by moving defendant setting forth guidelines, business practices, advertising and marketing practices and corporate group dictate as to the company stance on the health risks associated with smoking is demonstrative of the existence of a principal/agent relationship between moving defendant and its subsidiary Brown & Williamson from which the apparently conceded propriety of the exercise of personal jurisdiction over Brown & Williamson inures to moving defendant. See *Magnecomp Corp v. Athene Co., Ltd.* (1989) 209 Cal.App.3d 526, 535; *Northern Nat. Gas Co. of Omaha v. Superior Court* (1976) 64 Cal.App.3d 983, 994; and plaintiffs' lodged exhibits M and N. Although the Court recognizes that the mere existence of a parent/subsidiary relationship between moving defendant and Brown & Williamson does not automatically equate to the imputation of the apparently conceded propriety of exercising jurisdiction over Brown & Williamson to moving defendant, the aforementioned evidence as indicative of moving defendant's use of Brown & Williamson as its instrumentality in this state for establishing market share, selling of tobacco products, advertising for purposes of selling tobacco products and disseminating information on the health risks of smoking does in fact give rise to the imputation of jurisdiction over Brown & Williamson to moving defendant. Contrary to moving defendant's

interpretation of said evidence as but mere suggestions issued by a parent, in actuality the semantics of said documents as well as their self-evident import demonstrate mandatory directives and the exercise of control by moving defendant as the parent by and to its subsidiary, Brown & Williamson. Consequently, the apparently conceded sufficient minimum contacts with this forum by Brown & Williamson are imputed to moving defendant as the directing and controlling parent thereof from which limited jurisdiction will lie in this litigation emanating from Brown & Williamson's forum-related activities.

Further warranting the exercise of limited jurisdiction over moving defendant is that moving defendant has failed to demonstrate that same will be violative of "traditional notions of fair play and substantial justice". See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) and *Burger King Corp. v. Rudzewicz*, 472 U.S. 462, 476-477 (1986). Specifically, moving defendant has failed to even address, let alone establish, the availability of an alternative forum, this forum's interest in exercising jurisdiction over it, the competing interests of such an alternative forum and this forum and the efficiency and convenience of relief obtained in this forum in already existing litigation. *Burger King Corp. v. Rudzewicz, supra* at 476-477. In fact and upon independent analysis of said factors, it is self-evident that the exercise of jurisdiction over moving defendant in this forum would in fact comport with "traditional notions of fair play and substantial justice". As this action was commenced by California resident plaintiffs for claimed injuries sustained in this state arising from moving defendants' alleged wrongful acts inclusive of the perpetration of fraud through

its subsidiary, necessarily this state has a strong interest in exercising jurisdiction and on balance outweighs any minimal burden of mere financial detriment inuring to moving defendant as a foreign national litigating in this forum. See *Asahi Metal Industry Co., Ltd. v. Superior Court* (1987) 480 U.S. 102, 114.

In light of the foregoing, the Court declines to rule on plaintiffs' two additional proffered bases purportedly justifying the exercise of personal jurisdiction over moving defendant. Additionally and in light of the foregoing, plaintiffs' request for a continuance of the instant motion for purposes of conducting jurisdictional discovery is rendered moot.

Motion to quash on the ground of insufficient service of process on moving defendant by way of international registered mail in purported contravention of the provisions of the Hague Convention is similarly denied as moving defendant has failed to establish that the United Kingdom has objected to same in accordance with Article 10 of said Convention. See CCP §413.10 and 20 U.S.T. 361 (1969). Although not lodged by moving defendant, apparently moving defendant claims that the United Kingdom has in fact filed an objection to various non-mail modes of service as otherwise authorized pursuant to subsections (b) and (c) of Article 10 of the Hague Convention. Assuming the veracity of said claim, such at first blush does not necessarily equate to a finding that the United Kingdom has similarly objected to mail service as otherwise authorized by subsection (a) of Article 10 of the Hague Convention. Despite same, the Court does recognize the existence of both state

and federal authority equating a signatory state's objection to subsections (b) and (c) to also an objection to mail service pursuant to subsection (a). See *Suzuki Motor Co., Ltd. v. Superior Court* (1988) 200 Cal.App.3d 1476 and *Honda Motor Co., Ltd. v. Superior Court* (1992) 10 Cal.App.4th 1043. See also, *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) and *Mateo v. M/S Kiso*, 805 F.Supp. 792 (N.D. Cal. 1992). However and representative of a clear split of authority on both a state and federal level, other courts have held to the contrary that a signatory state's objection to subsections (b) and (c) of Article 10 of the Hague Convention does not in fact equate to a similar objection to mail service pursuant to subsection (a) of said Article. See *Shoei Kako Co., Ltd. v. Superior Court* (1973) 33 Cal.App.3d 808, 820-822. See also, *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986); *Meyers v. Asics Corp.*, 711 F.Supp. 1001, 1007-1008 (C.D. Cal. 1989); *R. Griggs Group, Ltd. v. Filanto Spa*, 920 F.Supp. 1100, 1107-1108 (D.Nev. 1996); *EOI Corp. v. Medical Marketing Ltd.*, 172 F.R.D. 133, 142 (D.N.J. 1997); and *Trump Taj Mahal Associates v. Hotel Services, Inc.*, 183 F.R.D. 173, 1998 U.S. Dist. LEXIS 17690 at *24, fn. 5 (D.N.J. 1998). In light of this clear split of authority both binding as to the California appellate decisions on stare decisis grounds and as to the federal cases as interpretation and application of the Hague Convention is a question of federal law, this Court is called upon to follow one line of cases in adjudicating the instant motion. Upon exacting scrutiny of the aforecited cases, this Court declines to follow the *Suzuki* state and *Bankston* federal line of cases as upon review thereof, it appears central to those decisions that the mail service at issue therein was effectuated in signatory states wherein mail service was not an effectual internal mode

of service within said states. See *Suzuki*, *supra* at 1481 and *Honda*, *supra* at 1047-1048. See also, *Bankston*, *supra* at 173. As moving defendant herein has wholly failed to establish that mail service is not an effectual internal mode of service within the United Kingdom, necessarily these line of cases are not dispositive herein. Consequently, the Court finds the *Shoei Kako Co.* state decision and *Ackermann v. Levine* federal line of cases on point and thus controlling thereby dictating a finding that plaintiffs' service on moving defendant herein by international registered mail in the United Kingdom effectual as not violative of the Hague Convention.

The Court notes the parties' improper unofficial Lexis citations to federal cases and failure to lodge copies of extra-territorial authorities in derogation of the provisions of CRC 313(c) and 313(e).

The Court further notes that plaintiffs improperly filed a coordinated opposition to two differing motions in derogation of coordinated Rule 6.8. In the future, plaintiffs are instructed to file a separate opposition to each motion they intend to oppose.

Last and in light of the recent consolidation of the San Diego Superior and Municipal Courts, this department has been renumbered as Department 69 and counsel are instructed that all future notices of motions should delineate same.

Moving defendant is to answer the operative pleadings in accordance with the provisions of CCP §418.10(c).

APPENDIX B — ORDER OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA DENYING PETITION FOR WRIT OF MANDATE DATED AND FILED JUNE 22, 1999

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D033111

(Judicial Council Coordination Proceedings
No. JCCP 4042)

B. A. T. INDUSTRIES,

Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent;

NORTH COAST TRUST FUND, et al.,

Real Parties in Interest.

THE COURT:

The petition for writ of mandate and opposition have been read and considered by Presiding Justice Kremer and Associate Justices Haller and McDonald. The petition is denied.

s/ [illegible]
KREMER, P.J.

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED AND FILED SEPTEMBER 15, 1999

Fourth Appellate District, Division One, No. D033111
S080297
IN THE SUPREME COURT OF CALIFORNIA

B. A. T. INDUSTRIES,

Petitioner

v.

SAN DIEGO COUNTY SUPERIOR COURT,

Respondent

NORTH COAST TRUST FUND Et Al.,

Real Parties In Interest

Petition for review DENIED.

s/ BAXTER
Acting Chief Justice

APPENDIX D — HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

USA Multilateral

Judicial Procedure

MULTILATERAL

Signed: The Hague November 15, 1965
In Force: February 10, 1969

Service Abroad of Judicial and Extrajudicial Documents

Convention done at The Hague November 15, 1965; Ratification advised by the Senate of the United States of America April 14, 1967; Ratified by the President of the United States of America April 24, 1967; Ratification of the United States of America deposited with the Ministry of Foreign Affairs of the Netherlands August 24, 1967;[1] Proclaimed by the President of the United States of America January 8, 1969; Entered into force February 10, 1969.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the convention on the service abroad of judicial and extrajudicial documents in civil or commercial

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1. For designations and declarations made in connection with the deposit, see page 373.

matters done at The Hague on November 15, 1965, was signed for the United States of America on that same date;

WHEREAS a certified copy of the text of the said convention in the English and French languages is word for word as follows:

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

Appendix D

CHAPTER I — JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Appendix D

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall

complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Appendix D

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with —

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Appendix D

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over

the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Appendix D

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgement even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled —

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend,

or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II — EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

Appendix D

CHAPTER III — GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with —

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following —

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of —

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Appendix D

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at the Hague on 17th July 1905,[1] and on 1st March 1954,[2] this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

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1. 99 BFSP 990.

2. 286 UNTS 265

Appendix D

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede

to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposits, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extention on the sixtieth day after the notification referred to in the preceding paragraph.

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Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following —

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

For the Federal Republic of Germany, (s.) KARL HERMANN KNOKE

For Austria,

For Belgium, (s) VAN DER STRATEN 21 I 1966

For Denmark,

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For Spain,

For the United States of America, (s.) WILLIAM ROYALL TYLER

For Finland, (s.) SIGURD VON NUMERS

For France,

For Greece,

For Ireland,

For Israel, (s.) DAVID SHALTIEL 25.XI.1965

For Italy,

For Japan,

For Luxembourg,

For Norway,

For the Netherlands, (s.) J. LUNS

For Portugal,

For the United Arab Republic, (s) SAYED FAHMI 1st of March 1966

For the United Kingdom of Great Britain and Northern Ireland, (s) PETER GARRAN 10th December 1965

For Sweden,

For Switzerland,

For Turkey,

For Yugoslavia,

WHEREAS the Senate of the United States of America by its resolution of April 14, 1967, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said convention;

WHEREAS the President of the United States of America on April 24, 1967 duly ratified the convention, in pursuance of the advice and consent of the Senate;

WHEREAS Article 27 provides that the convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification;

WHEREAS instruments of ratification were deposited with the Ministry of Foreign Affairs of the Netherlands as follows: United States of America on August 24, 1967; the United Kingdom of Great Britain and Northern Ireland on November 17, 1967; and the United Arab Republic on December 12, 1968;

AND WHEREAS, pursuant to the provisions of Article 27 of the convention, the convention will enter into force on February 10, 1969;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, to the end that the convention and every article and clause thereof shall be observed and fulfilled with good faith on and after February 10, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eighth day of January in the year of our Lord one thousand nine hundred sixty-nine and of the Independence of the United States of America the one hundred ninety-third.

LYNDON B. JOHNSON

By the President: DEAN RUSK Secretary of State

Designations and Declarations Made on the Part of the United States in Connection with the Deposit of the United States Ratification

1. In accordance with Article 2, the United States Department of State is designated as the Central Authority to receive requests for service from other Contracting States and to proceed in conformity with Articles 3 to 6.

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2. In accordance with Article 6, in addition to the United States Department of State, the United States Department of Justice and the United States Marshal or Deputy Marshal for the judicial district in which service is made are designated for the purpose of completing the certificate in the form annexed to the Convention.

3. In accordance with the second paragraph of Article 15, it is declared that the judge may, notwithstanding the provisions of the first paragraph of Article 15, give judgment even if no certificate of service or delivery has been received, if all the conditions specified in subdivisions (a), (b) and (c) of the second paragraph of Article 15 are fulfilled.

4. In accordance with the third paragraph of Article 16, it is declared that an application under Article 16 will not be entertained if it is filed (a) after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered, or (b) after the expiration of one year following the date of the judgment, whichever is later.

5. In accordance with Article 29, it is declared that the Convention shall extend to all the States of the United States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

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